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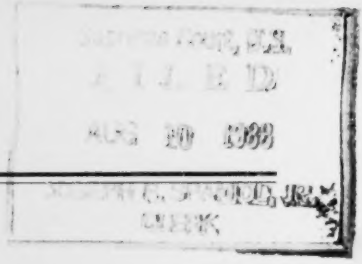

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

KEVIN ROBINSON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JOHN R. WILLIAMS
WILLIAMS & WISE
51 Elm Street, Suite 409
New Haven, CT 06510
(203) 562-9931

Counsel for Petitioner

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QUESTION PRESENTED

Did the Connecticut Courts violate *Beck v. Alabama* and *Hopper v. Evans* by holding "that a defendant does not have a fundamental constitutional right to a jury instruction on a lesser included offense"?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

Kevin Robinson, Petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court entered April 5, 1988.

OPINION BELOW

The opinion of the Appellate Court of Connecticut is officially reported at 14 Conn. App. 40 (1988). It is reproduced in the Appendix to this Petition beginning at App. A-1.

A petition for certification was denied by the Connecticut Supreme Court on June 15, 1988. That order is reproduced in the Appendix to this Petition beginning at App. D-1.

JURISDICTION

The judgment of the Connecticut Appellate Court, affirming Petitioner's conviction of sexual assault in the first degree, was entered on April 5, 1988. A timely Petition to certify an appeal was filed with the Connecticut Supreme Court and denied by that Court on June 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part: "Nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

2. Section 53a-70 of the Connecticut General Statutes provides in relevant part as follows: "A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."

3. Section 53a-73a of the Connecticut General Statutes provides in relevant part as follows: "A person is guilty of sexual assault in the fourth degree when: . . . (2) such person subjects another person to sexual contact without such other person's consent. . . ."

STATEMENT OF THE CASE

Kevin Robinson, the Petitioner herein, was 21 years old when charged with sexual assault in the first degree. Following a jury trial, he was convicted and sentenced to a term of seven years in prison. His conviction has been affirmed by the Connecticut Appellate Court and the Connecticut Supreme Court has refused to certify the matter for further appeal.

The alleged victim testified at trial that she was residing at a half-way house for psychiatric patients, having recently been discharged from a Connecticut State Mental Institution, on November 11, 1984. Mr. Robinson and she had been high school classmates and that evening she asked him to drive her to the regular meeting of the Naugatuck, Connecticut Ambulance Corps, where he was a volunteer and she had held a similar position prior to her hospitalization. She spoke to Corps officials in an unsuccessful effort to obtain reinstatement, and then told the Petitioner that she was "ready to go."

She and Petitioner decided to "ride around" for a time, and eventually pulled onto a dirt road and stopped the car. She testified that the Petitioner "started kissing me and stuff. . . . I told him to stop, just bring me home." But she said the Petitioner "pulled up my shirt. . . . I froze. . . . he put his mouth on my breast. . . . he pulled down my pants and then he pulled down his pants and he took my leg and he put my leg on top of the seat and he got on top of me and that's when he put his penis in my vagina and then I started pushing him off me. . . . I was saying stop it, I wanted to go home, and he said don't worry about it, I know it's going to hurt, nobody's going to know about. . . . I was just trying to grab hold of hips and I kept trying to push him off me."

She said the Petitioner then drove her home, although they stopped for coffee along the way. Later that night, she was "talked into going" to the hospital by a Rape Crisis counselor, but did not complain to the police until three days later.

At trial, the Petitioner denied having had sexual intercourse with the complainant. His attorney's cross-examination of the complainant, however, was devoted not to refuting her claim of sexual intercourse but to an effort to demonstrate that the sexual intercourse did not involve the use of force.

At the close of the evidence, the Petitioner requested in writing that the trial Court instruct the jury on the lesser included offense of sexual assault in the fourth degree. Sexual assault in the fourth degree differs from sexual assault in the first degree in that the element of force is not required. The trial Court refused to instruct on this lesser included offense and its failure to do so was assigned as error on appeal.

The Connecticut Appellate Court affirmed the conviction. The Court held that the Petitioner's written request for a lesser included offense jury instruction was not in proper form because the request to charge did not include explicit reference to the factual basis for the request. For that reason, the Appellate Court declined to reach the merits of the claim. This procedural requirement, however, bars appellate consideration only of non-constitutional issues and does not act as a bar to issues of federal constitutional magnitude. *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973). The Appellate Court expressly held, as a necessary part of its holding, "that a defendant does not have a fundamental constitutional right to a jury instruction on a lesser included offense." In so holding, the Connecticut Appellate Court relied on two prior decisions of the Connecticut Supreme Court, *State v. Ostrowski*, 201 Conn. 534, 557, 518 A.2d 915 (1986); *State v. Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980).

In his Petition for Certification, the Petitioner expressly asked the Connecticut Supreme Court to reconsider its prior holding that there is no federal constitutional right to a lesser included offense jury instruction, assigning as error the holding to that effect by the Appellate Court in this case. The Connecticut Supreme Court denied certification.

Accordingly, Petitioner is incarcerated solely because of the plainly erroneous holding of the Connecticut Courts that there is no federal constitutional right to a lesser included offense jury instruction.

REASONS FOR GRANTING THE WRIT

The holdings of the Connecticut Appellate Court and the Connecticut Supreme Court, that there is no federal constitutional right to a lesser included offense jury instruction, plainly contradict the prior holdings of this Court in *Beck v. Alabama* and *Hopper v. Evans.*

This case is the most recent in a line of Connecticut cases stretching back almost a decade which have refused to follow this Court's prior holdings that the right to a lesser included offense jury instruction in a criminal case is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Beck v. Alabama*, 447 U.S. 625 (1980), a death penalty case, this Court held that the Due Process Clause of the Fourteenth Amendment requires in such a case that a jury be instructed on any lesser included offense fairly suggested by the evidence. In doing so, this Court followed a logical progression from its earlier holding in *Keeble v. United States*, 412 U.S. 205, 208 (1973), which found it unnecessary to address the constitutional issue. The constitutional rule was further elaborated by this Court's subsequent holding in *Hopper v. Evans*, 456 U.S. 605 (1982), holding that a lesser included offense instruction is required by due process when the evidence warrants such an instruction.

This constitutional mandate has been ignored by the Connecticut Courts since its inception. In this case, the Connecticut Courts expressly refused to consider the question whether the evidence warranted the lesser included offense instruction because of their holding that there was no constititutional right to it under any circumstances.

On its own facts, this case cries out for relief. The Petitioner, a very young man with no prior criminal record, faces a long prison term for the alleged rape of a high school girlfriend. The jury was unconstitutionally deprived of the right to consider a lesser included offense.

This case is far more important than even its own facts suggest, however, because it is but the latest in a long line of Connecticut cases which have consistently refused to follow the constitutional mandate of this Court with respect to lesser included offense jury instructions. Connecticut is completely out of line with due process on this issue and must be brought into conformance with the Constitution.

CONCLUSION

For the above reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

JOHN R. WILLIAMS
51 Elm Street, Suite 409
New Haven, CT 06510
(203) 562-9931
Attorney for Petitioner

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

KEVIN ROBINSON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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STATE OF CONNECTICUT V. KEVIN ROBINSON

(4686)

Information charging the defendant with the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before Reynolds, J.; verdict and judgment of guilty, from which the defendant appealed to this court. No error.

John R. Williams, for the appellant (defendant).

Marcia B. Smith, assistant state's attorney, with whom on the brief, was John A. Connelly, state's attorney, for the appellee (state).

FOTI, J. The defendant appeals from the judgment of conviction, after a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70(a).[1] The defendant claims that as a matter of law the state filed to prove the defendant used force, an essential element of the crime, and that the court erred in refusing to charge the jury that sexual assault in the fourth degree, General Statutes § 53a-73a,[2] is a lesser included offense of sexual assault in the first degree. We find no error.

---

[1] General Statutes § 53a-70(a) provides: "A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."

General Statutes § 53a-65(7) defines "use of force" as "(A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim."

[2] General Statutes § 53a-73a provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: . . . (2) such person subjects another to sexual contact without such other person's consent."

The jury could reasonably have found the following facts. At the time of the assault the victim was a resident at a halfway house for psychiatric patients, having recently been discharged from Fairfield Hills State Hospital, where she had been treated for anxiety, depression and suicidal tendencies. On the evening of the assault she asked the defendant, a high school friend, to drive her to a meeting of the Naugatuck Ambulance Corps where the victim and the defendant had been volunteers. After the meeting, the defendant asked the victim if she wanted to "ride around." She agreed to "ride around" and after a period of time the defendant drove down a dirt road and parked. The defendant began kissing the victim, she demanded that he stop and that he return her to the halfway house. The defendant, however, pulled the victim's blouse and put his mouth on her breast at which point she "froze." The defendant proceeded to remove the victim's pants and succeeded in having vaginal intercourse with her. The victim testified that she told him to stop and attempted, unsuccessfully, to push him away.

The defendant's first claim is that the state failed to offer sufficient proof on the element of force for the jury to convict him of sexual assault in the first degree beyond a reasonable doubt and therefore erred in denying his motion for acquittal. In particular, the defendant claims that no force was required because the victim "froze and offered no resistance" until after penetration has occurred.[3] Although this claim was not properly preserved at trial, we will review it under *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973) and *State v. Thurman*, 10 Conn. App. 302, 523 A.2d 891, *cert. denied*, 204 Conn. 805, 528 A.2d 1152 (1987), as it raises claims of constitutional proportions; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); and is adequately supported by the record.

---

[3] Although the defendant took the stand and testified that he did not engage in any intimate contact with the victim, he contends that even if the jury completely disbelieved his testimony, at most, he is guilty of sexual assault in the fourth degree based on the victim's testimony.

The standard that applies when a jury verdict is challenged for insufficiency of the evidence is well settled. The issue is whether the jury could reasonably have concluded, upon the facts established and inferences reasonably drawn therefrom, that the defendant was guilty beyond a reasonable doubt. *State v. Baskins,* 12 Conn. App. 313, 316, 530 A.2d 663 (1987). "The evidence must be given a construction most favorable to sustaining the jury's verdict." *State v. Carter,* 196 Conn. 36, 44, 490 A.2d 1000 (1985); see *State v. Monk,* 198 Conn. 430, 432, 503 A.2d 591 (1986). Every element of the crime charged must be proved, and although it is in the province of the jury to draw logical inferences from the facts proven, they may not resort to speculation. *State v. Baskins, supra.*

" 'We do not sit as a juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the jury's opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility.' *State v. Stepney,* 191 Conn. 233, 255, 464 A.2d 758 (1983), *cert. denied,* 465 U.S. 1084, 104 S.Ct. 1455, 79 L.Ed.2d 772, *reh. denied,* 466 U.S. 954, 104 S.Ct. 2163, 80 L.Ed.2d 547 (1984). "We cannot retr the facts or pass upon the credibility of the witnesses." *Johnson v. Flammia,* 169 Conn. 491, 497, 363 A.2d 1048 (1975); *State v. Penland,* 174 Conn. 153, 158, 384 A.2d 356, *cert. denied,* 436 U.S. 906, 98 S.Ct. 2237, 56 L.Ed.2d 404 (1978)." *State v. Monk, supra,* 433.

The state was required, in this case, to prove that the defendant compelled the victim to engage in sexual intercourse through the "use of force." The element of "use of force" is a question of fact for the jury. *State v. Monk, supra; State v. Kish,* 186 Conn. 757, 766–67, 443 A.2d 1274 (1982). The victim testified that when the defendant began to kiss her she told him to stop and to take her home. The defendant, however, pulled up her shirt and put his mouth on her breast; she testified that at this moment she "froze." She testified, further, that he then removed her pants and forced himself upon her

telling her he knew it would hurt. She told him to stop and attempted, unsuccessfully, to push him off of her.

We conclude that these facts cannot be distinguished from those in *State v. Kish, supra*, where our Supreme Court found sufficient evidence of force to uphold the jury's verdict. *Id.*, 767. The trial court, therefore, did not err in refusing to grant the defendant's motion for acquittal.

The defendant's second claim is that the court erred in refusing to charge the jury that sexual assault in the fourth degree is a lesser included offense of sexual assault in the first degree. We cannot reach the merits of this claim as the defendant failed to comply with the rule of practice which requires that he articulate the legal and factual basis for his requested charge. Practice Book § 854. The defendant submitted two written requests to charge the jury on a lesser included offense, neither of which complied with § 854.[4] Our decision, therefore, is controlled by *State v. Ostroski*, 201 Conn. 534, 518 A.2d 915 (1986), and *State v. Merritt*, 11 Conn. App. 628, 528 A.2d 863 (1987).

---

[4] The defendant's first request to charge stated:

> "Although the defendant has been specifically charged with Sexual Assault in the First Degree, the very nature of this offense under our penal code is such that it may include the elements of the crime of Sexual Assault in the Third Degree and Sexual Assault in the Fourth Degree. Accordingly, if you find that the proof is not sufficient to justify a conviction of the crime charged, you must consider whether it is sufficient to establish, beyond a reasonable doubt, his guilt of Sexual Assault in the Third Degree. Of course, if you find him guilty of the more serious crime of Sexual Assault in the First Degree you need go no further in your deliberation. Likewise, if you find the proof is not sufficient to justify a conviction of the crime of Sexual Assault in the Third Degree, you must consider whether it is sufficient to establish beyond a reasonable doubt his guilt of the lesser offense of Sexual Assault in the Fourth Degree."

(continued)

We note at the outset that a defendant does not have a fundamental constitutional right to a jury instruction on a lesser included offense. *State v. Ostroski, supra,* 557; *State v. Whistnant,* 179 Conn. 576, 588, 427 A.2d 414 (1980).

In *State v. Whistnant,* our Supreme Court concluded that a defendant is entitled to an instruction on a lesser offense only if the following conditions are met: "(1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without first having committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." *Id.,* 588.

A proposed instruction on a lesser included offense is not appropriate unless made in compliance with Practice Book § 854. *State v. McIntosh,* 199 Conn. 155, 158, 506 A.2d 104 (1986). Practice Book § 854 provides: "[R]equests . . . shall

---

[4] *(continued)*

The defendant's second request to charge stated:

> "To sum up, it is your duty to decide whether the accused is guilty of the crime of Sexual Assault in the First Degree, or Sexual Assault in the Third Degree, or Sexual Assault in the Fourth Degree, or whether he is not guilty. If you find the accused committed the crime of Sexual Assault in the First Degree, then your verdict will be simply guilty as charged. If you find that instead of Sexual Assault in the First Degree, Sexual Assault in the Third Degree was committed, your verdict will be guilty of Sexual Assault in the Third Degree. If you find that the accused did not commit either a Sexual Assault in the First Degree or Third Degree but did commit Sexual Assault in the Fourth Degree your verdict will be guilty of Sexual Assault in the Fourth Degree. Then, of course, if you conclude that the accused did not commit Sexual Assault in any degree, your verdict will be not guilty."

be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, and the evidence to which the proposition would apply. . . ." (Emphasis added.) See *State v. Ostroski, supra,* 558.

An appropriate instruction under *State v. Whistnant* must include a complete statement of the essential facts that would justify the court charging as requested. *State v. Merritt, supra,* 631. The defendant's request contains no facts or propositions of law upon which the court could justify giving the charge requested. We conclude, therefore, that the court did not err in refusing to give the charge of lesser included offense. Nor is there merit to the defendant's claim that we are precluded from upholding the trial court's ruling because the state's objection to the charge was based on the third prong of *State v. Whistnant,* rather than the first. Practice Book § 854 and the first prong of *State v. Whistnant,* impose an affirmative duty on the defendant which is neither unreasonable nor novel. *State v. Merritt, supra,* 632. This duty is not optional, nor can it be waived by the state. The defendant must provide the trial court with the factual and legal basis for the charge before an appellate court can find error in the court's refusal to give the charge as requested. In this case, the trial court did not err in refusing the defendant's request to charge on sexual assault in the fourth degree.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT
APPELLATE COURT

NO. A.C. 4686

STATE OF CONNECTICUT

VS

KEVIN ROBINSON : May 25, 1988

O R D E R

THE MOTION OF THE DEFENDANT, FILED APRIL 14, 1988, FOR REARGUMENT OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D denied.

BY THE COURT,

/s/ Michele L. Angers
ASSISTANT CLERK — APPELLATE

NOTICE SENT: 5-25-88
HON. JOHN REYNOLDS
CLERK, SUPERIOR COURT, WATERBURY
CR4114361
JOHN R. WILLIAMS
JOHN A. CONNELLY, S.A.
MARCIA SMITH, A.S.A.
REPORTER OF JUDICIAL DECISIONS

SUPREME COURT

STATE OF CONNECTICUT

NO. A.C. 4686

STATE OF CONNECTICUT	:	APPELLATE COURT
VS.	:	STATE OF CONNECTICUT
KEVIN ROBINSON	:	JUNE 2, 1988

PETITION FOR CERTIFICATION

JOHN R. WILLIAMS
WILLIAMS & WISE
51 Elm St., Suite 409
New Haven, CT 06510
(203) 562-9931

Attorney for Petitioner
Kevin Robinson

BASIS FOR CERTIFICATION

I

WHEN THE FACTS OF THE CASE JUSTIFY IT, A DEFENDANT IN A CRIMINAL CASE HAS A FEDERAL CONSTITUTIONAL RIGHT TO A LESSER INCLUDED OFFENSE JURY INSTRUCTION.

The Appellate Court in this case held that, although the facts of the case presumably were sufficient to permit a jury instruction on a lesser included offense, the defendant had no constitutional right to such a jury instruction. 14 Conn. App. at 44. In so holding, the Appellate Court relied upon the prior rulings of this Court. *E.g., State v. Ostroski,* 201 Conn. 534, 518 A.2d 915 (1986); *State v. Whistnant,* 179 Conn. 576, 588, 427 A.2d 414 (1980). However, the United States Court of Appeals for the Second Circuit held last year that a defendant in a criminal case has a constitutional due process right to a lesser included offense jury instruction if the evidence would permit the jury rationally to find him guilty of the lesser offense and acquit him of the greater. *United States v. Zapata-Tamallo,* 833 F.2d 25, 28 (2d Cir. 1987).

Thus, in holding that the defendant in this case had no constitutional right to a lesser included offense jury instruction, the Appellate Court committed federal constitutional error. This is a question of substance and involves a matter of great public importance.

II

BECAUSE IN THIS CASE THE DEFENDANT HAD A FEDERAL CONSTITUTIONAL RIGHT TO A LESSER INCLUDED OFFENSE JURY INSTRUCTION, HIS FAILURE TO USE THE CORRECT FORM IN SUBMITTING HIS WRITTEN REQUEST FOR SUCH AN INSTRUCTION DID NOT DEPRIVE THE APPELLATE COURT OF JURISDICTION TO CONSIDER THE ISSUE.

The defendant submitted to the trial Court a written request to charge the jury on a specific lesser included offense. However, he failed to supply the Court with specific proposed language which would bring the facts of the case into relationship with the law.

Section 854 of the Practice Book, by its terms, is not jurisdictional and does not deprive the Appellate Court or this Court of the right to consider whether the trial Court committed constitutional error in rejecting a proposed jury instruction. The Appellate Court, however, treated the defendant's failure to state his written request in language outlined by Section 854 as jurisdictional — that is, the sort of error which precludes an Appellate Court from considering whether the jury instruction should have been given. There is no authority for this holding, particularly when a federal constitutional right is involved as here. This is a question of substance not previously determined by the Supreme Court and is a question of great public importance.

III

THE STATE CAN WAIVE FORMAL DEFECTS IN A WRITTEN REQUEST TO CHARGE A JURY IN A CRIMINAL CASE.

In this case, the defendant submitted a written request to charge the jury as to a lesser included offense. That written request failed to discuss the facts of the case in relationship

to the applicable law. However, the written request was the subject of extensive oral argument in the trial Court. During that oral argument, the State expressly objected to the request only on substantive grounds and failed to advance any objection on the basis of the form in which the request had been submitted. The Appellate Court, however, in refusing to consider whether error was committed in rejecting the proposed jury charge, held specifically that the State has no power to waive a formal defect of this kind. There is no authority for this holding and the holding is a particularly pernicious one in light of the fact that the requested jury instruction was a matter of federal constitutional right.

In deciding this question, the Appellate Court decided a question of substance which has not previously been determined by the Supreme Court and decided a question of great public importance.

SUMMARY OF THE CASE

The Petitioner Kevin Robinson was convicted of sexual assault in the first degree (C.G.S. § 53a-70). Heide Butrej testified for the State that on November 11, 1984, she was residing at a half-way house for psychiatric patients, having recently been discharged from a State mental hospital. That evening, at her request, Mr. Robinson — who had been her high school classmate — had driven her to the regular meeting of the Naugatuck Ambulance Corps, where he was a volunteer and she had held a similar position prior to her hospitalization. She spoke to Corps officials in an unsuccessful effort to obtain reinstatement and then told Mr. Robinson she was "ready to go."

She and Mr. Robinson decided to "ride around" for a time, and eventually pulled onto a dirt road and stopped the car. Mr. Robinson "started kissing me and stuff. . . . I told him to stop, just bring me home." But Mr. Robinson, she said, "pulled up my shirt. . . . I froze. . . . He put his mouth on my breast. . . . He pulled down my pants and then he

pulled down his pants and he took my leg and he put my leg on top of the seat and he got on top of me and that's when he put his penis in my vagina and then I started pushing him off me. . . . I was saying stop it, I wanted to go home, and he said don't worry about it, I know it's going to hurt, nobody's going to know about it. . . . I was just trying to grab hold of his hips and I kept trying to push him off me."

She said Mr. Robinson then drove her home, although they stopped for coffee on the way. Later that night she was "talked into going" to the hospital by a rape crisis counsellor, but did not complain to the police until three days later.

Mr. Robinson requested in writing that the Court charge the jury on the lesser included offense of sexual assault in the fourth degree (C.G.S. § 53a-73a(a)(2)) There was extensive oral argument on this request at which the State raised only a single objection — the claim that, because Mr. Robinson had testified and denied having any sexual contact at all with Ms. Butrej, he was not entitled to a lesser included offense instruction. The Court accepted the prosecution argument and declined to charge the jury on the lesser included offense for the reasons advanced by the State. Neither the State nor the trial Court raised any question about the form of the request to charge.

The Appellate Court did not dispute the fact that there was a sufficient factual basis for a lesser included offense instruction, and it is not in dispute that the defendant's failure to admit to conduct constituting a lesser included offense does not preclude the Court from charging on it if there is otherwise a sufficient factual basis for such a charge. *E.g., State v. Burge*, 195 Conn. 232, 235, 487 A.2d 532 (1985).

The Appellate Court held "that a defendant does not have a fundamental constitutional right to a jury instruction on a lesser included offense." Citing *State v. Ostroski, supra; State v. Whistnant, supra.* 14 Conn. App. at 44. The Appellate Court held, secondly, that Mr. Robinson's failure in his written request

to charge to cite the "authority upon which it is based and the evidence to which the proposition would apply," P.B. § 854, precludes appellate review. "We cannot reach the merits of this claim as the defendant failed to comply with the rule of practice which requires that he articulate the legal and factual basis for his requested charge." 14 Conn. App. at 43, 45.

Mr. Robinson asserted on appeal that the State had waived its right to object on the ground of form by having made no such objection at the trial level, but the Appellate Court held that the "duty" to follow the form prescribed by Section 854 of the Practice Book "is not optional, nor can it be waived by the State." 14 Conn. App. at 45.

Mr. Robinson's appellate brief was filed prior to the ruling of the Second Circuit in *Zapata-Tamallo, supra.* He filed a timely motion for reargument or reconsideration specifically citing *Zapata-Tamallo,* but his motion was denied on May 25, 1988.

ARGUMENT

In deciding this case, the Appellate Court was required to follow the prior holdings of this Court in *State v. Ostroski, supra,* and *State v. Whistnant, supra,* that there is no constitutional right to a lesser included offense jury instruction in a criminal case. In light of the holding by the Second Circuit in *United States v. Zapata-Tamallo, supra,* however, this Court's prior holdings cannot stand. The Second Circuit has made it absolutely clear that the due process clause requires that a lesser included offense jury instruction be given where the facts of the case justify it. There is no question that the facts of the present case justified such a jury charge and, accordingly, the defendant had a constitutional right to it.

Because Mr. Robinson had a federal constitutional right to have his jury charged on sexual assault in the fourth degree as a lesser included offense, the entire holding of the Appellate Court must fall. The defendant's failure to follow the

precise form prescribed by the Practice Book in his written request to charge, particularly where the State made no objection on that ground, cannot bar the litigation of this federal constitutional claim — particularly since the constitutional nature of the claim did not become clear until long after the conviction. The test of *State v. Evans,* 165 Conn. 61, 327 A.2d 576 (1973), clearly is met in this case. The record supports the claim, the action below raises a question of fundamental constitutional dimension, the constitutional basis for the claim was not apparent until after judgment entered, there is no prejudice to the State, and the action of the trial Court constituted reversible error.

Moreover, in holding as it did that the failure to comply exactly with the form called for by the Practice Book precludes appellate review and in further holding that the State has no power to waive such a formal defect, the Appellate Court wrote on a clean slate. There is no authority, nor was any claimed by the Appellate Court, for either of these two propositions. Particularly because constitutional rights are involved here, these rulings cannot be permitted to stand. Moreover, the facts of this case call out for appellate relief since it is clear that this defendant has been harshly judged indeed for conduct which, assuming it took place, is more appropriately categorized as a misdemeanor.

CONCLUSION

Because of the major issues involved here, this Court should grant the instant Petition for Certification.

THE PETITIONER, KEVIN ROBINSON

By /s/ John R. Williams

JOHN R. WILLIAMS
His Attorney

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-87-1146

State of Connecticut

v.

Kevin Robinson

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (14 Conn. App. 40) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/ Cynthia M. Gworek

Assistant Clerk — Appellate

Dated: June 15, 1988

Notice to: 6/15/88
Clerk, Superior Court, Waterbury — CR4 114361
Clerk, Appellate Court
John R. Williams
John A. Connelly, S.A.
Marcia Smith, A.S.A.

John R. Williams in support of petition — *Marcia B. Smith, Assistant State's Attorney* and *John A. Connelly, State's Attorney* in opposition.

Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-338

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

KEVIN ROBINSON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

STEVEN M. SELLERS
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney
Division of Criminal Justice
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

Counsel of Record for the Respondent

QUESTION PRESENTED

SHOULD THIS COURT REVIEW THE PETITIONER'S CLAIM THAT DUE PROCESS REQUIRED A LESSER INCLUDED OFFENSE INSTRUCTION WHERE THE STATE APPELLATE COURT DISPOSED OF THE CASE ON STATE PROCEDURAL DEFAULT GROUNDS, THE DEFENDANT FAILED TO RAISE THE CLAIM IN EITHER THE TRIAL COURT OR THE APPELLATE COURT, AND THE CLAIM ITSELF IS INSUBSTANTIAL ON THE MERITS?

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CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons thereof. The following, while neither controlling nor fully measuring the Court's discretion indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way to conflict with applicable decisions of this court.

Connecticut Superior Court Rules

§ 852. Submission for Verdict--Necessity for Requests to Charge and Exceptions

The supreme court shall not be

bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon request, opportunity shall be given to present the exception out of hearing of the jury. (P.B. 1963, Sec. 2263.)

§ 854. Submission for Verdict--Form and Contents of Requests

When there are several requests, they shall be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, and the evidence

to which the proposition would apply. Requests to charge should not exceed fifteen in number unless, for good cause shown, the court permits the filing of an additional number. If the request is granted, the judicial authority shall apply the proposition of law to the facts of the case.

A principle of law should be stated in but one request and in but one way. Requests attempting to state in different forms the same principle of law as applied to a single issue are improper.

OPINION BELOW

The opinion of the Connecticut Court is reported at 14 Conn. App. 40, 539 A.2d 606 (1987), and is reproduced in the Petitioner's appendix.

STATEMENT OF THE CASE

A. Facts and Trial Proceedings

The Petitioner was convicted of sexual assault in the first degree; Connecticut General Statutes §53a-70. The victim testified that on November 11, 1984, she went to a meeting of the Naugutuck Ambulance Corps with the Petitioner, a high school classmate. After the meeting, they decided to "ride around" for a time. The Petitioner eventually pulled into a dirt road and stopped the car. He began kissing the victim. She told him to stop and take her home. Instead, however, the Petitioner pulled up the victim's shirt and she "froze". He put his mouth on her breast, pulled down her pants and his own pants. He took her leg and placed it on top of the seat. He got on top of her

and tried to separate her legs while the victim repeatedly put them together, telling him to stop and take her home. He placed his penis in her vagina. Then the victim attempted to grab hold of his hip and to push him off of her, but was unable to do so. The Petitioner said "Don't worry about it, I know its going to hurt, nobody's going to know about it." The Petitioner took the stand and denied any sexual contact with the victim.

At the close of evidence, the Petitioner submitted written requests that the trial court instruct the jury on two lesser included offenses, sexual assault in the third degree; Connecticut General Statutes § 53a-72a; and sexual assuault in the fourth degree; General Statutes § 53a-73a. The State opposed

the requests on the ground that, in light of the Petitioner's denial of the entire incident, the elements distinguishing the offense charged from the lesser included offenses were not in dispute as required. See State v. Whistnant, 179 Conn. 576, 427 A.2d 414 (1980). The Petitioner did not refer to a due process right to a lesser included offense. The trial court declined the requests and charged the jury only on sexual assault in the first degree.

B. State Appellate Proceedings

The Petitioner raised two claims in the Connecticut Appellate Court: (1) that there was insufficient evidence of the use of force to sustain a conviction for sexual assault in the first degree and (2) that the trial court erred in failing to instruct the jury on sexual

assault in the fourth degree. He not only failed to raise any due process claim at that time but, in his brief, actually conceded that there was no constitutional right to a lesser included offense instruction and thus no basis for review of the claim under the exceptional circumstances doctrine stated in State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973).[1] See Appendix at A-6.

As to the Petitioner's first claim, the Appellate Court reviewed the evidence of force and found it sufficient

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[1] Under Connecticut law, an unpreserved issue qualifies for appellate review if "the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial". State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973). The Petitioner recognized that a defect in the written request to charge could bar review on appeal but argued that the state had waived any such objection at trial.

to sustain the conviction.

It declined to review the Petitioner's second claim on procedural default grounds, finding that the request to charge submitted by the Petitioner was not in compliance with Section 852 in that it failed to state essential facts that would justify the charge requested. In accordance with the decision of the Connecticut Supreme Court in State v. Ostroski, 201 Conn. 534, 556-59, 518 A.2d 915 (1986) and its own opinion in State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987), the Appellate Court applied the rule that a trial court's refusal to charge the jury as requested is not erroneous where the written request fails to comply with Section 854 of the Superior Court rules. See Superior Court Rules § 852. See also

State v. Whistnant, supra at 588.

The Petitioner then moved for reargument in the Appellate Court. At that time, he asserted for the first time that due process requires a lesser included offense instruction if the evidence would permit a jury rationally to convict the defendant of the lesser offense and acquit him of the greater, quoting United States v. Zapata-Tamallo, 833 F.2d 25, 28 (2d Cir. 1987)(due process clause requires lesser included offense instruction if warranted by evidence in non-capital case).

After the motion was denied, he petitioned to the Connecticut Supreme Court for certification, again raising the due process claim. The petition for certification to the Connecticut Supreme Court was denied.

REASONS FOR DENIAL OF THE PETITION

As a result of the Petitioner's failure to timely raise the due process claim and the Appellate Court's disposition of the case on procedural default grounds, the Petition does not raise a question of federal law that was squarely addressed by a state court or that was decided in a manner conflicting with other state or federal court decisions. See Sup. Ct. R. 17.1(b).

I. THE DECISION OF THE STATE APPELLATE COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

In State v. Whistnant, 179 Conn. 576, 427 A.2d 414 (1980), the Connecticut Supreme Court established the test for determining whether a defendant is entitled to a lesser included offense instruction. Such an instruction must be given if and only if "(1) an appropriate

instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without first having committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser. " Id. at 588.

The importance attached by Connecticut courts to the submission of a

proper request to charge is evidenced not only by first prong of the Whistnant test but also by the rules of court, which provide that the appellate courts shall not be bound to consider a claim of error relating to the giving or refusal to give a jury instruction where the appellant failed to submit a written request to charge. Superior Court Rules §852.

The rules serve the legitimate purpose of facilitating the task faced by the trial court. In applying the third and fourth prongs of the Whistnant test, it must determine (1) whether the evidence would permit a conviction on only the lesser offense and (2) whether the distinguishing elements were sufficiently in dispute. If the request is granted, the court must apply the

pertinent proposition of law to the facts of the case. Superior Court Rules § 854. These tasks are rendered much simpler where the party requesting the charge identifies the evidence it claims justifies the request. As stated by the Connecticut Supreme Court in State v. McIntosh, 199 Conn. 155, 506 A.2d 104 (1986)

> The ever increasing refinement of our law justifies cooperation of counsel in stating requests for jury instructions and this cooperation is mandated, at least to the extent of substantial compliance with Practice Book § 852. The minor burden of cooperation imposed by this section is neither unreasonable nor novel. Our courts have long recognized that [an inadequate] request . . . "hinders rather than helps" the trial court in determining whether a particular instruction should be given. See Marinelli v. Cutarelli, 2 Conn. Cir. Ct. 15, 20, 193 A.2d 727 (1963) . . .

State v. McIntosh, supra at 160-61.

The Petitioner's failure to comply

with the procedural rule in question is an independent and adequate state ground barring review by this Court of the federal question raised. Hathorn v. Lovorn, 457 U.S. 225 (1982); Michigan v. Tyler, 436 U.S. 499, n. 7 (1978).

While certiorari has on occasion been granted where the procedural rule in question is irregularly enforced; NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 456 (1958); or where it serves no legitimate purpose; see Henry v. Mississippi, 379 U.S. 443 (1965), neither of these situations is presented here. The rule declining appellate review in the absence of a proper request to charge serves the legitimate interest of assisting the trial and appellate courts in determining when a lesser included offense instruction is

warranted. State v. McIntosh, supra. Moreover, it has been consistently applied by both the Connecticut Supreme and Appellate Courts. State v. Ostroski, supra; State v. McIntosh, supra, State v. Killenger, 193 Conn. 48, 57, 475 A.2d 276 (1984); State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987).

II. REVIEW IS BARRED BY THE PETITIONER'S FAILURE TO TIMELY RAISE THE FEDERAL CLAIM IN THE STATE COURTS

It is essential to the jurisdiction of this Court in reviewing the decision of a state court, that a federal question be presented to the state's highest court, that the question be decided and that the resolution of the federal question be essential to its determination of the case. Lynch v. New York, 293 U.S. 52, 54 (1934). None of these prerequisites has been satisfied

by the Petitioner in this case.

Although the due process clause had been first held to require a lesser included offense instruction in Beck v. Alabama, 447 U.S. 625 (1980) -- well before the trial in this matter -- the Petitioner failed to raise any constitutional claim until his motion for reargument in the Connecticut Appellate Court and his petition for certification to the Connecticut Supreme Court. These motions were denied without opinion. Accordingly, the record contains no decision of a state court addressing the federal question now raised.

Moreover, the statement of the Connecticut Appellate Court that there is no constitutional right to a lesser included offense instruction was not necessary to its resolution of the case,

but rather dicta. It simply applied the established principle that a trial court does not err in declining to charge as requested where the written request fails to comply with the rules of court. The Petitioner now makes a strained attempt to characterize that statement as the holding, by asserting that review would have been available under State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973), if the Appellate Court had recognized the constitutional ramifications of the request to charge.

The Appellate Court made no reference to State v. Evans, supra, however. Indeed, the Petitioner had conceded in his brief that Evans review was not available with respect to his second claim.

In any event, it is unlikely that

the Appellate Court would have reviewed the claim under Evans, had it been urged to do so.

First, the Connecticut Supreme Court has stated that a lesser included offense instruction may be required by the due process clause only in capital cases. State v. Franko, 199 Conn. 481, 495 n.15, 508 A.2d 22 (1986).

Second, as the Appellate Court interprets the Evans doctrine, a limited review of the record must support a defendant's assertion that the claim is truly of constitutional dimension and not merely labeled as such. State v. Thurman, 10 Conn. App. 302, 306-07, 523 A.2d 891 (1987). In light of the non-capital nature of the case, the Connecticut Supreme Court's statement in Franko and the petitioner's failure to

offer at trial a factual basis upon which the jury could have convicted him of the lesser offense, it is evident that, had the Appellate Court applied Evans analysis, it would have concluded that no right of truly constitutional dimension was implicated in the petitioner's second claim. Its broadly-stated view that there is no constitutional right to a lesser included offense was thus not necessary to its disposition of the case.

Accordingly, in light of the Petitioner's failure to timely raise the federal constitutional claim, and the absence of a state court decision squarely addressing the question, this Court should not assume jurisdiction over the matter, notwithstanding an apparent conflict with United States v

Zapata-Tamallo, 833 F.2d 25 (2d Cir. 1987).

III. THE CLAIM IS INSUBSTANTIAL ON ITS MERITS

This Court has never held that the due process clause requires a lesser included offense instruction in a non-capital case. Indeed, the rationale of this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980) was carefully limited to capital cases, stating "there is a significant constitutional difference between the death penalty and lesser punishments". Id. at 637.

Moreover, the due process clause requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. Hopper v. Evans, 456 U.S. 605 (1982). The elements distinguishing sexual

assault in the first degree and sexual assault in the fourth degree are (1) the presence or absence of force and (2) whether the assault involved "sexual intercourse" or "sexual contact" as those terms are defined in General Statutes §53a-65(2) and (3).

After reviewing the evidence, the Appellate Court concluded that the evidence of force was sufficient to support the conviction for sexual assault in the first degree. The Petitioner has not sought further review of that finding. Additionally, the Petitioner's defense was that no sexual contact occurred, not that it was consensual or limited to mere sexual contact. Thus, the evidence provided no evidentiary basis upon which the jury could have aquitted the Petitioner of

the greater offense and convicted him of the lesser. Accordingly, the Petitioner was not entitled to the lesser included offense instruction. Hopper v. Evans, supra.

The Petioner's claim that he was entitled to a lesser included offense instruction as a matter of due process is thus lacking in merit.

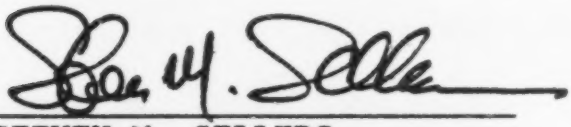
CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to the Connecticut Supreme Court.

Respectfully Submitted,

STATE OF CONNECTICUT

RESPONDENT

By: 

STEVEN M. SELLERS
Assistant State's Attorney
Office of the Chief State's Attorney
Connecticut Division of Criminal Justice
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373
COUNSEL OF RECORD FOR RESPONDENT

With whom on brief:

CAROLYN K. LONGSTRETH
Deputy Assistant State's Attorney

No. 88-338

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APPENDIX

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APPENDIX A

EXCERPT FROM THE PETITIONER'S BRIEF IN THE CONNECTICUT APPELLATE COURT

II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO CHARGE THE JURY ON THE LESSER INCLUDED OFFENSE OF SEXUAL ASSAULT IN THE FOURTH DEGREE

There is no doubt that in this case sexual assault in the fourth degree, Conn. Gen. Stat. §53a-73a(a)(2), is a lesser included offense of sexual assault in the first degree, Conn. Gen. Stat. §53a-70(a). "The test for determining whether one crime is a lesser included offense of another crime is whether it is possible to commit the greater offense in the manner described in the information or bill of particulars without having first committed the lesser." State v. Hodge, 201 Conn. 379, 385, 517 A.2d 621 (1986). As

applied to this case, the only factor distinguishing between sexual assault in the fourth degree and sexual assault in the first degree is that the latter adds to the former the requirement of use of force. There was no dispute on this at trial.

The state objected to the giving of the lesser included offense instruction on one ground and one ground only--that the third and fourth requirements of State v. Whistnant, 179 Conn. 576, 588, 427 A.2d 414 (1980), had not been met. Those requirements are "(3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on which the element or elements which differentiate

the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." State v. Whistnant, supra; State v. Fernandez, 5 Conn. App. 40, 45, 496 A.2d 533 (1985) (Hull, J.).

The state here argued, and the trial court found, that because the defendant had testified that he had no sexual contact whatever with Miss Butrej, the issue of whether sexual contact without force, was not truly in dispute and the jury lacked a sufficient evidentiary basis to convict of the lesser offense. (App. pp. 40-41, 87) The court based its refusal to charge on the lesser offense on its belief that "[t]here are some cases that I believe

say where the defendant takes the stand and he denies the entire incident, there is no lesser included offenses." (App. p. 87)

The defendant's failure to confess to sexual assault in the fourth degree, contrary to the view of the prosecution and the trial court, did not preclude him from having the jury instructed on the lesser offense. A defendant can be entitled to lesser included offense instructions even if he does not testify at all. E.g., State v. Burge, 195 Conn. 232, 235, 487 A.2d 532 (1985). The issue is simply whether the differentiating fact is in dispute and whether there exists a factual basis for a conviction of the lesser offense.

In this case, defense counsel vigorously cross-examined Miss Butrej

and through that cross-examination demonstrated a genuine dispute on the "use of force" element and provided a clear factual basis for conviction on the lesser offense. (App. pp.25, et seq.) The third and fourth prongs of Whistnant were met here.

The foregoing having been said it must also be noted that the defendant's trial attorney did not precisely comply with the first Whistnant prong -- that he request "an appropriate instruction" in accordance with the rules. This court and the Supreme Court have made it clear that, to be entitled to a lesser included offense charge, a defendant must in his request accurately state the law and apply it to the facts as developed at trial. State v. Merritt, 11 Conn. App. 628, 528 A.2d 863 (1987);

State v. Ostroski, 201 Conn. 534, 418 A.2d 915 (1986). Although defense counsel in this case actually submitted two written requests to charge the jury on the lesser included offense, neither of them stated the law or discussed the applicable facts. (App. pp. 2-5)

An Evans analysis would not appear to be available on this issue because of the Supreme Court's holding that there is no constitutional right to a lesser included offense instruction. State v. Jacobowitz, 194 Conn. 408, 480 A.2d 557 (1984).

In this case, however, the state clearly waived any claim it might have had to object to the giving of a lesser included offense charge on this ground. Neither the state nor the trial court expressed any difficulty whatever with

the form of the defendant's request. The only issue preserved by the state, and the only one relied upon by the trial court, was whether a defendant who denies having committed any crime can nevertheless receive the benefit of a lesser included offense instruction.

The state having waived its first prong objection, the defendant is entitled to a new trial before a jury properly instructed on sexual assault in the fourth degree.